Supreme Court, U.S.
FILED
DEC 10 1997
CLERK

(5)

No. 96-1469

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

HERNAN RAMIREZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF AUTHORITIES

Cases:	Page
Benefield v. *State*, 160 So. 2d 706 (Fla. 1964)	13
Briscoe v. *LaHue*, 460 U.S. 325 (1983)	12-13
Commonwealth v. *Cundriff*, 415 N.E.2d 172 (Mass. 1980)	13
Dalia v. *United States*, 441 U.S. 238 (1979)	18
Davis v. *Michigan Dep't of Treasury*, 489 U.S. 803 (1989)	12
Franks v. *Delaware*, 438 U.S. 154 (1978)	17
Gilbert v. *United States*, 366 F.2d 923 (9th Cir. 1966), cert. denied, 388 U.S. 922 (1967)	12
Illinois v. *Gates*, 462 U.S. 213 (1983)	9
Ker v. *California*, 374 U.S. 23 (1963)	18
Maryland v. *Buie*, 494 U.S. 325 (1990)	3
Maryland v. *Garrison*, 480 U.S. 79 (1987)	18
Miller v. *United States*, 357 U.S. 301 (1958)	11
O'Gilvie v. *United States*, 117 S. Ct. 452 (1996)	17
Ornelas v. *United States*, 116 S. Ct. 1657 (1996)	4
People v. *Brinker*, 140 N.Y.S. 448 (N.Y. Cty. Mag. Ct. 1912)	15
People v. *Cocchiara*, 221 N.Y.S.2d 856 (N.Y. Cty. Ct. Gen'l Sess. 1961)	14-15
People v. *Dumas*, 512 P.2d 1208 (Cal. 1973)	13
People v. *Goldfarb*, 229 N.Y.S.2d 620 (N.Y. Cty. Ct. Gen'l Sess. 1962)	14
People v. *Maddox*, 294 P.2d 6 (Cal.), cert. denied, 352 U.S. 858 (1956)	13
People v. *Montanaro*, 229 N.Y.S.2d 677 (Kings Cty. Ct. 1962)	14
People v. *O'Neill*, 60 N.Y.S.2d 246 (App. Div. 1946)	15
People ex rel. Simpson Co. v. *Kempner*, 208 N.Y. 16 (1913)	15
Phelps v. *McAdoo*, 94 N.Y.S. 265 (Sup. Ct. 1905)	15
Read v. *Case*, 4 Conn. 166 (1822)	13

Cases—Continued: Page

Richards v. *Wisconsin*, 117 S. Ct. 1416 (1997) 2, 3, 18
Sabbath v. *United States*, 391 U.S. 585 (1968) ... 5, 11, 13
Salinas v. *United States*, No. 96-738 (Dec. 2, 1997) 12
Scull v. *State*, 178 S.E.2d 720 (Ga. Ct. App. 1970) .. 13
Seminole Tribe of Florida v. *Florida*, 116 S. Ct. 1114 (1996) 3
State v. *Bamber*, 630 So. 2d 1048 (Fla. 1994) 13
State v. *Christiana*, 186 So. 2d 580 (La.), cert. denied, 385 U.S. 835 (1966) 13
State v. *Ford*, 801 P.2d 754 (Or. 1990) 14
State v. *Furry*, 286 N.E.2d 301 (Ohio Ct. App. 1971) 13
State v. *Johnson*, 230 A.2d 831 (R.I. 1967) 13
Terry v. *Ohio*, 392 U.S. 1 (1968) 3
United States v. *Bonner*, 874 F.2d 822 (D.C. Cir. 1989) 12
United States v. *Brown*, 52 F.3d 415 (2d Cir. 1995), cert. denied, 516 U.S. 1068 (1996) 12
United States v. *Buckley*, 4 F.3d 552 (7th Cir. 1993), cert. denied, 510 U.S. 1124 (1994) 12
United States v. *Carter*, 566 F.2d 1265 (5th Cir.), cert. denied, 436 U.S. 956 (1978) 17
United States v. *Dahlman*, 13 F.3d 1391 (10th Cir. 1993), cert. denied, 511 U.S. 1045 (1994) 12
United States v. *Garcia*, 741 F.2d 363 (11th Cir. 1984) 12
United States v. *Garcia Mendez*, 437 F.2d 85 (5th Cir. 1971) 12
United States v. *Harris*, 435 F.2d 74 (D.C. Cir. 1970) 12
United States v. *Jewell*, 60 F.3d 20 (1st Cir. 1995) .. 12
United States v. *Kane*, 637 F.2d 974 (3d Cir. 1981) 12

Cases—Continued: Page

United States v. *Karo*, 468 U.S. 705 (1984) 17
United States v. *Kennedy*, 32 F.3d 876 (4th Cir. 1994), cert. denied, 513 U.S. 1128 (1995) 12
United States v. *Leon*, 468 U.S. 897 (1984) 18
United States v. *Manfredi*, 722 F.2d 519 (9th Cir. 1983) 12
United States v. *Maxwell*, 25 F.3d 1389 (8th Cir.), cert. denied, 513 U.S. 1031 (1994) 12
United States v. *Morris*, 977 F.2d 677 (1st Cir. 1992), cert. denied, 507 U.S. 988 (1993) 18
United States v. *Nabors*, 901 F.2d 1351 (6th Cir.), cert. denied, 498 U.S. 871 (1990) 12
Wilson v. *Arkansas*, 514 U.S. 927 (1995) 11, 13

Constitution, statutes and rules:

U.S. Const. Amend. IV 1, 2, 6, 10-11
Act of Oct. 26, 1974, Pub. L. No. 93-481, §§ (3), (4)(a), 88 Stat. 1455 16
Controlled Substances Act, Pub. L. No. 91-513, Tit. II, § 509(b), 84 Stat. 1274 15
District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, § 210, 84 Stat. 630 16
Espionage Act of 1917, ch. 30, Tit. XI, §§ 8-9, 40 Stat. 229 14
18 U.S.C. 3109 ..... 2, 5, 10, 11, 12, 13, 14, 15, 17
Fed. R. Crim. P.:
Rule 41 17
Rule 41(h) 8
1881 N.Y. Laws, ch. 442 14
N.Y. Code Crim. Proc. §§ 791-813 (McKinney 1917) .. 14

Miscellaneous:

H.R. Conf. Rep. No. 65, 65th Cong., 1st Sess. (1917) 14
H.R. Conf. Rep. No. 69, 65th Cong., 1st Sess. (1917) 14

Miscellaneous—Continued: Page

H.R. Rep. No. 30, 65th Cong., 1st Sess. (1917) 14
H.R. Conf. Rep. No. 1442, 93d Cong., 2d Sess. (1974) 16

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 96-1469

UNITED STATES OF AMERICA, PETITIONER

v.

HERNAN RAMIREZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondent does not directly defend the court of appeals' holding that a two-tier analysis governs the permissibility of no-knock entries, under which a heightened showing is needed to sustain the entry if the police damage property. Instead, his principal submission is that the inquiry into whether an unannounced entry is lawful under the Fourth Amendment depends on a totality-of-the-circumstances test; he then suggests that damage to property is one factor in the analysis and that such damage imposes a greater burden on officers to justify the entry. Resp. Br. 13-14, 30. Aside from being a different analysis than that embraced by the Ninth Circuit, respondent's position independently lacks merit. Absent from respondent's argument is an adequate justification for why, when officers have "a reasonable suspi-

cion" (*Richards* v. *Wisconsin*, 117 S. Ct. 1416, 1418 (1997)) that an announcement before entry would be dangerous, the officers' decision to make a no-knock entry may be found invalid based on circumstances that develop later. In fact, neither the Ninth Circuit's two-tier test nor respondent's approach can be derived from the Fourth Amendment or from the statutory codification of common-law knock-and-announce principles in 18 U.S.C. 3109.

1. a. Respondent's defense of the judgment below begins with an assertion (Br. 14) that *Richards'* articulation of a reasonable suspicion standard is "dictum." In *Richards*, this Court adopted the requirement that, before officers may make an unannounced entry, they must have reasonable suspicion to believe that they face an increased risk of danger, destruction of evidence, or the flight of a fugitive. 117 S. Ct. at 1421-1422. That requirement constitutes a holding, not "dictum." In *Richards*, the Court rejected the state court's view that there is a blanket exception to the knock-and-announce requirement for felony drug searches, and instead ruled that an unannounced entry must be justified on the facts of a particular case by "reasonable suspicion." *Id.* at 1421. The Court then affirmed the judgment by applying that standard: "Although we reject the Wisconsin court's blanket exception to the knock-and-announce requirement, we conclude that the officers' no-knock entry into Richards' hotel room did not violate the Fourth Amendment. We agree with the trial court, and with Justice Abrahamson, that the circumstances in this case show that the officers had a reasonable suspicion that Richards might destroy evidence if given further opportunity to do so." *Id.* at 1422. The Court's application of a "reasonable suspicion"

standard in upholding the judgment cannot properly be characterized as "dictum." See, *e.g.*, *Seminole Tribe of Florida* v. *Florida*, 116 S. Ct. 1114, 1129 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."). And the Ninth Circuit's two-tier approach to unannounced entries cannot be reconciled with the single "reasonable suspicion" standard articulated in this Court's unanimous decision in *Richards*.[1]

b. Respondent contends (Br. 18) that, because one purpose of the knock-and-announce rule "is the prevention of damage to property, it makes no sense" to bar courts from considering property damage "under

---

[1] The "reasonable suspicion" standard adopted in *Richards* was modeled on the similar standard required by this Court to justify pat-down searches and protective sweeps. See *Richards*, 117 S. Ct. at 1422 (citing *Terry* v. *Ohio*, 392 U.S. 1 (1968); *Maryland* v. *Buie*, 494 U.S. 325 (1990)). In neither area has the Court required heightened justification if property is damaged during the intrusion. Respondent disputes the validity of our analogies to a pat-down search or a protective sweep of a home, because neither is "governed by the requirements of the knock-and-announce principle, one of whose fundamental purposes is the protection of the individual's home against invasion and damage." Resp. Br. 29. But protective sweeps directly intrude on the privacy of a home, and stop-and-frisk encounters intrude on the equally fundamental security of a person. This Court's cases permitting such intrusions based on a reasonable suspicion do not imply that the level of justification required of officers is raised if property is damaged during the intrusion. Indeed, the safe accomplishment of a *Terry* frisk or protective sweep may require some damage to property, but there is still no requirement that the officers must make a higher showing of danger. Similarly, a no-knock entry does not require officers to make an additional showing of danger when the entry involves some damage to property.

the totality of circumstances surrounding the entry." That objection misunderstands the nature of the reasonable suspicion inquiry courts must make. As this Court explained in *Ornelas* v. *United States*, 116 S. Ct. 1657, 1661-1662 (1996) (emphasis added), "[t]he principal components of a determination of reasonable suspicion or probable cause will be the events which occurred *leading up to the stop or search*, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause." That assessment properly involves consideration of events that *precede* the decision to undertake the search or seizure requiring reasonable suspicion, but does not encompass events that occur afterward—events that by definition cannot be known by the officers when they embark on the action in question.[2]

Respondent suggests (Br. 18) that the existence or degree of property damage is relevant in evaluating

[2] The proper inquiry also does not encompass the variable of how many officers are involved in the particular operation—a factor on which respondent would make the constitutional rule of reasonableness turn. See Resp. Br. 38 (the more officers on the scene, the less reasonable their fear of danger). The constitutionality of a particular intrusion should not depend on how a particular operation is staffed; it should be based on whether the officers have the requisite reasonable suspicion that the occupant will commit violent acts against them, destroy evidence, or flee. Indeed, the use of a large force of officers may simply corroborate and reflect the officers' reasonable belief that a suspect poses a particular danger of violence or flight. But the use of such a force should not be turned against the officers to deprive them of what would otherwise be a constitutionally reasonable means of reducing the risk that violence or flight might ensue.

the reasonableness of an unannounced entry because one of the values underlying the knock-and-announce rule is the prevention of damage to property. But the existence of that purpose behind the rule does not imply that property damage must be examined in each case as bearing on whether the entry was justified. A no-knock entry necessarily intrudes on values underlying the knock-and-announce rule. For that reason, this Court required, as a rule, that officers must be able to articulate a reasonable suspicion to justify it. The Court did not adopt a sliding scale that shifts depending on the intrusiveness of any particular entry. Thus, the fact that a particular unannounced entry may be destructive of property does not elevate the required showing to probable cause. And, by the same token, the fact that another no-knock entry may be accomplished peaceably and without any property damage does not permit the officers to justify it based merely on a subjective hunch. Cf. *Sabbath* v. *United States*, 391 U.S. 585, 589 (1968) (opening a closed but unlocked door still constitutes an unannounced intrusion under 18 U.S.C. 3109). Respondent's approach, in contrast, would require such a sliding scale. The effect would be to deprive officers of any assurance that the possession of reasonable suspicion will be sufficient to justify any particular entry.[3]

[3] It is possible that respondent's view is that the factor of property damage is the *only* consideration that may elevate the burden on officers to justify the entry, and that other actions that increase the intrusiveness of the entry have no similar consequence. If respondent intends to adopt that approach, however, it would inexplicably overvalue the property-protection rationale of the knock-and-announce rule as compared to the other interests promoted by the rule.

Respondent also asserts (Br. 19-21) that the safety of officers is particularly jeopardized when property is broken during an unannounced entry. From that proposition, he argues that, because one of the purposes of the knock-and-announce rule is to reduce the risk of violence to officers, an officer's need to damage property should increase the burden on him to justify the unannounced entry. There is no reason to believe, however, that law enforcement officers will engage in practices that exacerbate, rather than reduce, the dangers they face. If, as respondent asserts, a no-knock entry that results in damage to property necessarily increases the risk of harm to officers, the Fourth Amendment is not needed as a shield to protect citizens; officers' own prudence will regulate their willingness to employ the no-knock exception to the general principle of knock and announcement.

In any event, respondent's theory is not borne out by experience. First, the anecdotes recounted by respondent draw only an attenuated link between the breakage of property and the increased risk of danger. If those incidents properly may be generalized, it is the surprise encounter within a person's home (and not the damage to property) that triggers the danger in those circumstances. Such surprise, of course, can occur when officers make a no-knock entry without damaging property. Second, if the dangers of making no-knock entries over the past few decades had actually resulted in a large number of tragedies, those statistics would be available and would speak more powerfully than the isolated anecdotes recited by respondent.

Moreover, although the examples of dangerous circumstances cited throughout respondent's brief

have already been made known to this Court,[4] the Court nonetheless has recognized that the knock-and-announce rule gives way in appropriate circumstances. The issue here is whether the reasonable suspicion that justifies the departure from the knock-and-announce rule becomes insufficient when property is damaged. Respondent cannot carry the burden he sets for himself in contending that "property damage directly bears on the officers' interest in safety" (Resp. Br. 26), and there is no basis for requiring a higher showing than reasonable suspicion to justify a no-knock entry by officers when property is damaged.[5]

Ultimately, respondent cannot dispute that the property damage in this case is de minimis: "While the value of the glass was not great, it is the officers'

---

[4] See Pet. Br. at 29-32, *Richards* v. *Wisconsin*, No. 96-5955; Reply Br. at 13-14, *Richards* v. *Wisconsin*, No. 96-5955; Brief for American Civil Liberties Union et al. as Amicus Curiae at 26-27, *Wilson* v. *Arkansas*, No. 94-5707.

[5] Respondent states that "[t]he government argues that it is unreasonable to demand specific information as to dangerousness because such evidence is 'ordinarily unavailable' to officers." Resp. Br. 34. That is not our contention. *Richards* makes clear that the officers must have reasonable suspicion to believe that knocking and announcing will result in heightened danger to the officers, destruction of evidence, or flight. Our objection is to the Ninth Circuit's two-tier approach, which requires officers to make a greater showing of danger to justify breaking property. Whatever *additional* information is needed to meet that standard may not be available to officers when they make the tactical decision to break a lock or a window to effectuate entry. And, given the likelihood that few no-knock entries can be made without at least some property damage, the Ninth Circuit's requirement of a heightened showing in such cases is likely to swallow the reasonable-suspicion rule.

invasion of the sanctity of the home that is not trivial." Resp. Br. 9; see also *id.* at 36.[6] That fact underscores that property damage cannot be the litmus test for requiring additional justifications of the officers' decision to make an unannounced entry. Had the officers here deployed their guns by opening an unlocked window in respondent's house—thus creating the same "invasion of the sanctity of the home"—the Ninth Circuit's two-tier rule would not have required a greater showing of danger to the officers. Respondent's acknowledgment that the breakage of the property here was modest highlights the arbitrariness of the court of appeals' rule in the practical circumstances faced by law enforcement officers, who should not have to risk their lives, the destruction of evidence, or flight on the fortuity of an unlocked door or window.

c. Respondent argues (Br. 40) that we concede that "needless" property damage may be unconstitutional, and since, in his view, breaking the garage window was "needless," the entry here was unconstitutional. See Resp. Br. 40-41. We do not concede that the property damage in this case was "needless." Rather, it served two functions. First, it provided a means for

[6] Respondent objects that the damage was not de minimis because "the shattering of glass at night is precisely the kind of property damage that will arouse terror in sleeping residents." Resp. Br. 37. Yet respondent does not and cannot dispute that it would equally "arouse terror" if an individual awoke to find himself confronted by officers who had surreptitiously entered his home. Moreover, respondent's suggestion that the entry occurred "at night" is inaccurate on the facts of this case. The warrant was served at 6:15 a.m., an hour within the definition of "daytime," for purposes of executing warrants. See Fed. R. Crim. P. 41(h).

the officers to secure the garage, where previous information had led them to believe respondent stored firearms. Respondent's contention that the breaking would have drawn respondent (or Shelby) to the garage is precisely the point. Unless the officers could secure the garage from the window, they would risk being fired upon inside the house if respondent (or Shelby) got to the guns first. Second, breaking the window served as a diversion to confuse the occupants, thereby creating a tactical advantage for the officers. Whether the occupants would have known that the sound of breaking glass was a garage window or some other window in the house is unknown. But that kind of diversion may assist officers in securing the premises by drawing persons out from behind closed doors and out of rooms to locations where they may be more easily detained. It is hardly the sort of grossly excessive or wanton destruction of property that might call into question an otherwise valid entry.

d. Finally, respondent contends (Br. 37-38) that the officers lacked probable cause to believe that Shelby was on the premises. Neither of the courts below based its decision on that argument,[7] instead holding that the officers lacked the additional justification necessary to effect a no-knock entry that damages property. In any event, the evidence was sufficient to justify a belief that Shelby was at respondent's house, *i.e.*, that there was probable cause for the warrant. See *Illinois* v. *Gates*, 462 U.S. 213, 236 (1983) (noting deference due to issuing magistrate's finding of probable cause).

[7] See Pet. App. 10a, 12a. Indeed, the district court specifically approved the finding of probable cause. See *id.* at 30a-31a.

The affidavit in support of the search warrant stated that a special agent of the Bureau of Alcohol, Tobacco, and Firearms (ATF) had received information from a "Confidential Reliable Informant" (CRI), a person who had "given very reliable information to the ATF in the past, including information that led to the arrest of a fugitive felon." Pet. App. 39a. The CRI related that he "had seen a person believed to be Alan Shelby" at the address where respondent lived. *Ibid.* The CRI "also overheard 'Alan' make a statement approximating the following: 'I had to knock out a guard.'" *Ibid.* The officers knew that, when Shelby escaped custody, he had "assaulted a Deputy Sheriff by knocking him down." *Id.* at 37a. When the CRI told the ATF agent that information, the CRI did not know that Shelby had recently escaped from custody. *Id.* at 39a. But when he learned from the media the next day of Shelby's escape, the CRI again contacted the ATF agent, who later that day also personally observed a man "very similar to the photograph of Alan Shelby" outside of respondent's residence. *Id.* at 39a-40a. The CRI confirmed that he had seen the same person there the previous day when he reported the information to the ATF agent. The Deputy U.S. Marshall who swore to the affidavit also went to the premises and "couldn't make a positive I.D. but * * * believe[d] it was the same person described by [the ATF agent]." *Ibid.* Based on those facts, the magistrate had ample probable cause to issue a search warrant for Alan Shelby at respondent's residence.

2. As an alternative ground for affirming the judgment below, respondent argues (Br. 10, 41-49) that the knock-and-announce requirement codified in 18 U.S.C. 3109 is more restrictive than the knock-and-announce rule incorporated in the Fourth Amend-

ment's requirement that searches and seizures be "reasonable." In particular, respondent contends (Br. 10) that "Section 3109 contains no exception for officer safety at all." Those claims are unfounded.

This Court has repeatedly suggested, and the courts of appeals have unanimously held, that Section 3109 codifies the common-law knock-and-announce rule and its exceptions. In *Miller* v. *United States*, 357 U.S. 301, 313 (1958), this Court described Section 3109 as "codifying a tradition embedded in Anglo-American law." Similarly, in *Sabbath*, the Court characterized Section 3109 as "a codification" of common-law principles and noted that there "is little reason why" the "limited exceptions" to the common-law announcement rule "might not also apply to § 3109." 391 U.S. at 591 n.8; see also *Wilson* v. *Arkansas*, 514 U.S. 927, 934 n.3 (1995) (describing *Sabbath* as "suggesting that both the 'common law' rule of announcement and entry and its 'exceptions' were codified in § 3109").[8] Guided by those statements, for decades the courts of appeals have construed Section 3109 as incorporating the common-law

[8] In addressing other aspects of Section 3109, this Court has also repeatedly rejected the sort of strictly literal reading of the statute that respondent advocates, in favor of construing Section 3109 to parallel Fourth Amendment principles. In *Miller*, for example, the Court held that Section 3109 applies to the execution of arrest warrants and to warrantless arrests, even though by its terms it applies only to the execution of search warrants. 357 U.S. at 309. Moreover, the Court applied an exclusionary rule remedy for a violation of the statute even though the statutory text does not require (or authorize) such a remedy. *Id.* at 313-314. And in *Sabbath*, the Court interpreted the statute's reference to "break[ing] open" a door as including the opening of a closed but unlocked door. 391 U.S. at 590.

exceptions to the knock-and-announce requirement in various "exigent circumstances," including imminent destruction of evidence, flight by a recently escaped fugitive, and threats to officer safety.[9]

Respondent contends that, because Section 3109 does not explicitly recognize a general officer-safety exception, it is improper for the courts to construe the statute as though Congress intended to incorporate one. This Court, however, has recognized that statutes that codify the common law should be read in light of the doctrinal principles they embody, cf. *Salinas* v. *United States*, No. 96-738 (Dec. 2, 1997), slip op. 11, including the qualifications and limitations on those principles. *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 813 (1989); *Briscoe* v. *LaHue*,

[9] See, *e.g.*, *United States* v. *Jewell*, 60 F.3d 20, 23 n.2 (1st Cir. 1995); *United States* v. *Brown*, 52 F.3d 415, 424, 426 (2d Cir. 1995), cert. denied, 516 U.S. 1068 (1996); *United States* v. *Kane*, 637 F.2d 974, 977-979 (3d Cir. 1981); *United States* v. *Kennedy*, 32 F.3d 876, 882-883 (4th Cir. 1994), cert. denied. 513 U.S. 1128 (1995); *United States* v. *Garcia Mendez*, 437 F.2d 85, 86 (5th Cir. 1971); *United States* v. *Nabors*, 901 F.2d 1351, 1354 (6th Cir.), cert. denied, 498 U.S. 871 (1990); *United States* v. *Buckley*, 4 F.3d 552, 558 (7th Cir. 1993), cert. denied, 510 U.S. 1124 (1994); *United States* v. *Maxwell*, 25 F.3d 1389, 1395 (8th Cir.), cert. denied, 513 U.S. 1031 (1994); *United States* v. *Manfredi*, 722 F.2d 519, 524 (9th Cir. 1983) (characterizing the issue as "settled"); *United States* v. *Dahlman*, 13 F.3d 1391, 1398 (10th Cir. 1993), cert. denied, 511 U.S. 1045 (1994); *United States* v. *Garcia*, 741 F.2d 363, 366-367 (11th Cir. 1984); *United States* v. *Bonner*, 874 F.2d 822, 826 (D.C. Cir. 1989) (describing "danger to the entering officers" as one of the "most common and compelling bases that establish exigency"); *United States* v. *Harris*, 435 F.2d 74, 81 (D.C. Cir. 1970). The Ninth Circuit was one of the first to recognize an officer-safety exception under Section 3109. See *Gilbert* v. *United States*, 366 F.2d 923, 932 (9th Cir. 1966), cert. denied, 388 U.S. 922 (1967).

460 U.S. 325, 330-331 (1983); cf. *State* v. *Bamber*, 630 So. 2d 1048, 1053 (Fla. 1994) (applying that principle in interpreting Florida's knock-and-announce statute); *People* v. *Maddox*, 294 P.2d 6, 8-10 (Cal.) (Traynor, J.) (same), cert. denied, 352 U.S. 858 (1956). And the Court has applied that reasoning to Section 3109. See *Sabbath*, 391 U.S. at 589 ("[L]inguistic analysis seldom is adequate when a statute is designed to incorporate fundamental values and the ongoing development of the common law.").[10]

[10] The courts of appeals' longstanding interpretation of Section 3109 as embodying an exception based on officer safety has solid roots in the common law. As this Court recently stated in *Wilson*, "because the common-law rule was justified in part by the belief that announcement generally would avoid 'the destruction or breaking of any house * * * by which great damage and inconvenience might ensue,' courts acknowledged that the presumption in favor of announcement would yield under circumstances presenting a threat of physical violence." 514 U.S. at 935-936 (citations omitted). The officer-safety exception was the first exception to the knock-and-announce requirement recognized by American courts, see *Read* v. *Case*, 4 Conn. 166, 170 (1822), and it has been widely adopted, both in States where the common law continues to govern execution of search and arrest warrants, see, *e.g.*, *Commonwealth* v. *Cundriff*, 415 N.E.2d 172, 177-178 (Mass. 1980); *State* v. *Johnson*, 230 A.2d 831, 836-837 (R.I. 1967), and in States with statutes similar to Section 3109, which express the knock-and-announce requirement in seemingly unqualified language, see, *e.g.*, *People* v. *Dumas*, 512 P.2d 1208, 1214 (Cal 1973) (en banc), *Benefield* v. *State*, 160 So. 2d 706, 710 (Fla. 1964) (arrest warrants); *Scull* v. *State*, 178 S.E.2d 720, 722-723 (Ga. Ct. App. 1970); *State* v. *Christiana*, 186 So. 2d 580, 583-585 (La.) (arrest warrants), cert. denied, 385 U.S. 835 (1966); *State* v. *Furry*, 286 N.E.2d 301, 305 (Ohio Ct. App. 1971). Indeed, one state supreme court recently noted that it was "not aware of any state which, by statute or case law, has rejected an exception to its knock and announce rule based upon an officer's

Respondent seeks to draw support for his reading of Section 3109 from its legislative history, but that history is consistent with an interpretation of Section 3109 that recognizes an exception for officer safety. Section 3109 was enacted as part of the Espionage Act of 1917, ch. 30, Tit. XI, §§ 8-9, 40 Stat. 229. The conference committee report explains that the search warrant title of the Act "was based upon the New York law on this subject, and follows generally the policy of that law." H.R. Conf. Rep. No. 69, 65th Cong., 1st Sess. 20 (1917); see also H.R. Conf. Rep. No. 65, 65th Cong., 1st Sess. 20 (1917).[11]

What evidence there is of the "policy" of the New York law generally supports our position that an exception was recognized for situations in which officers faced heightened peril if they announced their presence while executing the warrant. After the enactment of Section 3109, New York decisions upheld the common-law exception for officer safety under the state knock-and-announce law. See *People* v. *Montanaro*, 229 N.Y.S.2d 677, 684-685 (Kings Cty. Ct. 1962) (search); *People* v. *Goldfarb*, 229 N.Y.S.2d 620, 622-623 (N.Y. Cty. Ct. Gen'l Sess. 1962) (arrest); *People* v. *Cocchiara*, 221 N.Y.S.2d 856, 860-862 (N.Y.

---

apprehension of peril." *State* v. *Ford*, 801 P.2d 754, 760 (Or. 1990).

[11] The New York law mentioned is the title of that State's code of criminal procedure addressing search warrants. See N.Y. Code Crim. Proc. §§ 791-813 (McKinney 1917). The Criminal Procedure Code was enacted in 1881. 1881 N.Y. Laws, ch. 442. The sections of the Espionage Act concerning forcible entry in the execution of search warrants did not appear in the original bill, but were added in conference. See H.R. Rep. No. 30, 65th Cong., 1st Sess. 8-9 (1917); H.R. Conf. Rep. No. 65, *supra*, at 20.

Cty. Ct. Gen'l Sess. 1961) (arrest). While those decisions were, of course, not known to the drafters of Section 3109, they are consistent with a 1913 decision of the New York Court of Appeals holding that the related sections of the State's criminal procedure code defining the grounds upon which a search warrant could be authorized were "the same in general character" as earlier codifications and the common law from which they all derived. *People ex rel. Simpson Co.* v. *Kempner*, 208 N.Y. 16, 22 (1913).[12]

Respondent's reliance (Br. 21-23) on the legislative history of the short-lived no-knock statutes of the early 1970s for his argument that there is no statutory exception for officer safety is similarly misplaced. In the Controlled Substances Act, Pub. L. No. 91-513, Tit. II, § 509(b), 84 Stat. 1274, Congress authorized magistrates to issue no-knock warrants in

---

[12] Respondent relies somewhat on *Phelps* v. *McAdoo*, 94 N.Y.S. 265 (Sup. Ct. 1905), for the proposition that the New York knock-and-announce statute admitted of no exceptions, but that case does not support his contention. In *Phelps*, the court considered what it termed an "act of mob violence" by 25 policemen who, armed with axes, broke into a gambling parlor through the windows and smashed everything in sight. *Id.* at 266. The case's principal holding was that a provision of the New York City Charter allegedly authorizing such conduct was void because, so interpreted, it clearly conflicted with constitutional proscriptions against unreasonable searches and seizures. *Id.* at 268; see also *People* v. *O'Neill*, 60 N.Y.S.2d 246, 249 (App. Div. 1946) (citing *Phelps* for this proposition); *People* v. *Brinker*, 140 N.Y.S. 448, 449 (N.Y. City Mag. Ct. 1912) (characterizing *Phelps* this way) (McAdoo, Ch. City Mag.). Although *Phelps* mentioned the knock-and-announce statute in passing, it addressed neither the question of what circumstances generally warranted an exception nor the issue of whether officer safety was one of those circumstances.

drug searches when there was probable cause to fear that announcement would lead to the destruction of the drugs sought or would endanger the officers executing the warrant. In the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, § 210, 84 Stat. 630, Congress authorized officers in the District of Columbia to execute search warrants permitting the breaking and entering of dwellings without prior announcement if such announcement would, among other things, lead to the destruction of the evidence sought or endanger the officers executing the warrant.

Four years later, Congress repealed both provisions. See Act of Oct. 26, 1974, Pub. L. No. 93-481, §§ (3), (4)(a), 88 Stat. 1455. In doing so, however, Congress made clear that it did not intend to disapprove of judicially recognized exceptions to the knock-and-announce requirement, including exceptions it had placed in those statutes and was now removing. The conference committee report on the repealing legislation noted that "[v]arious exceptions to the rule of announcement of identity and purpose before breaking and entering have been noted by the Supreme Court and by State and lower Federal courts." H.R. Conf. Rep. No. 1442, 93d Cong., 2d Sess. 5 (1974). "Furthermore," the report stated, "since the courts are continuing to define and explicate the exceptions to the announcement rule, the conferees do not intend the references in this statement to specific examples of exceptions (and the facts underlying them) as being an enumeration of the only exceptions to be permitted * * * . Rather, it is the intent of the conferees that the common law exceptions, as they may be prescribed by judicial decisions * * *, [will continue to] apply." *Ibid.* Thus, to the extent that the views of later Congresses are of any value in discerning the intent of earlier ones, see, *e.g.*, *O'Gilvie* v. *United States*, 117 S. Ct. 452, 458 (1996) (later views cannot control interpretation of earlier enacted statute), the views of the 93d Congress support the standard interpretation of Section 3109 as incorporating common-law exceptions to the knock-and-announce requirement. Cf. *United States* v. *Carter*, 566 F.2d 1265, 1268-1269 (5th Cir.) (in repealing no-knock statutes, Congress intended to retain common-law exceptions), cert. denied, 436 U.S. 956 (1978).

3. Respondent argues (Br. 49-50) that the search warrant in this case was void ab initio because the federal magistrate lacked statutory authority to issue a "no-knock" warrant. That contention is without merit.

Neither Section 3109 nor Federal Rule of Criminal Procedure 41 expressly addresses whether a magistrate may authorize a no-knock entry. Even on the assumption that the magistrate lacked authority to include a no-knock clause in the warrant—an issue no court of appeals has addressed—the legality of the search warrant itself would not be undermined. The magistrate's lack of no-knock authority would simply invalidate the warrant's no-knock clause, not the warrant as a whole. For example, when a portion of the affidavit supporting a probable cause determination is found to be knowingly or recklessly false, the warrant itself may stand if the untainted portions of the affidavit are sufficient to sustain the finding of probable cause. See *United States* v. *Karo*, 468 U.S. 705, 718 (1984); *Franks* v. *Delaware*, 438 U.S. 154, 171-172 (1978). Similarly, where part of a warrant is overbroad but the remaining portions are sufficiently particular, evidence seized under the valid portions of

the warrant generally need not be suppressed. See, *e.g.*, *United States* v. *Morris*, 977 F.2d 677, 682 (1st Cir. 1992), cert. denied, 507 U.S. 988 (1993). A severability principle makes equal sense here, where the allegedly invalid portion of the warrant concerns a subject—whether the officers may enter the premises without first announcing their presence—that is wholly distinct from the probable cause determination supporting the warrant's issuance. Cf. *Maryland* v. *Garrison*, 480 U.S. 79, 84 (1987); *Dalia* v. *United States*, 441 U.S. 238, 258 (1979).

The ultimate legality of the officers' decision to dispense with knocking and announcing rests not on the validity of the warrant's no-knock clause, but on the objective reasonableness of their judgments about the circumstances they confronted at the time of the search. See *Ker* v. *California*, 374 U.S. 23, 40 n.12 (1963) (plurality opinion). Respondent's position, however would penalize officers who take the precaution of testing the reasonableness of their judgments in front of a detached and neutral magistrate. This Court has approved the warrant process as a valuable check on police conduct when it comes to probable cause determinations. See, *e.g.*, *United States* v. *Leon*, 468 U.S. 897, 913-914 (1984). In light of that principle, penalizing the officers here for seeking a warrant would be anomalous. See also Pet. App. 22a n.1 (Kozinski, J., dissenting) (noting that no-knock search here was less troublesome than those in earlier Ninth Circuit cases because officers here sought and received a no-knock warrant); see also *Richards*, 117 S. Ct. at 1422 n.7 ("The practice of allowing magistrates to issue no-knock warrants seems entirely reasonable when sufficient cause to do so can be demonstrated ahead of time.").

* * * * *

For the foregoing reasons, as well as those stated in our opening brief, the judgment of the court of appeals should be reversed.

SETH P. WAXMAN
Solicitor General

DECEMBER 1997